IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-18 (2)

ROBERT D. GILMER,

Petitioner,

v.

INTERSTATE/JOHNSON LANE CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHERE THE TEXT, LEGISLATIVE HISTORY AND PURPOSES OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) DO NOT DISCLOSE A CONGRESSIONAL INTENT TO FORECLOSE ARBITRATION OF PETITIONER'S AGE CLAIM, DOES THE FEDERAL ARBITRATION ACT REQUIRE ENFORCEMENT OF PETITIONER'S INDIVIDUAL ARBITRATION AGREEMENT?

II. WHERE PETITIONER VOLUNTARILY AGREES TO ARBITRATE EMPLOYMENT DISPUTES WITH HIS EMPLOYER, IS THE AGREEMENT INVALID AS A PROSPECTIVE WAIVER OF SUBSTANTIVE RIGHTS?

PARTIES AND LIST OF AFFILIATED CORPORATIONS

The Respondent is properly identified in the Petition. There are no other affiliated corporations with an interest in this action. Respondent was formerly known as Interstate Securities Corporation.

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Respondent, Interstate/Johnson Lane Corporation, respectfully requests that this Court deny the Petition for Writ of

Certiorari seeking review of the Fourth Circuit's opinion in this case. That opinion is reported at 895 F.2d 195 (4th Cir. 1990), and is fully set out in the Appendix to the Petition at pages 1a-36a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

The Petition properly identifies each of the statutes involved in this case.

STATEMENT OF THE CASE

A. Proceedings Below

The Petition correctly sets forth the proceedings before the District Court and the Court of Appeals for the Fourth Circuit.

B. Facts

The facts essential for resolution of this Petition are reported in the Petition at page 3-4. However, Petitioner's arbitration agreement was not part of a collective bargaining agreement; rather, it was required for his employment as a securities broker for Respondent.

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

The Petition should be denied for several reasons. The decision below correctly applied this Court's decisions which have continued to expand the Federal Arbitration Act's authorization for arbitration of statutory claims. Rodriguez de Quijas v. Shearson/American Express, Inc., ___ U.S. ___, 109 S. Ct. 1917 (1989); Perry v. Thomas, 107 S. Ct.

2520 (1987); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985); Southland Corp. v. Keating, 465 U.S. 1 (1984). The Fourth Circuit also properly balanced the analytical framework required by those decisions against the special protections afforded a claimant under the ADEA and found no reason that the Petitioner's ADEA rights could not adequately be protected in an arbitral forum. In seeking to overcome the proper resolution of this case, the Petition contains several misstatements regarding the Fourth Circuit's decision as well as this Court's precedents. Furthermore, the Petition focuses only

on the results of the Fourth Circuit's analysis, not on the Court's analytical process or application of this Court's controlling decisions under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. Respondent submits that these arguments do not state a valid reason for granting certiorari.

The Fourth Circuit correctly followed the analytical framework required by this Court under the Federal Arbitration Act:

> To defeat application of the Arbitration Act . . ., the [party opposing arbitration] must demonstrate that Congress intended to make an exception to the Arbitration Act for claims arising under [a particular statute], an intention discernible from the text, history or purposes of the statute.

Shearson/American Express, Inc. v. McMahon, 107 S. Ct. at 2337-38 (1987)

(emphasis added). The Petition conspicuously does not demonstrate any fault in the Fourth Circuit's analysis of the ADEA under the standards enunciated by this Court in McMahon. The Circuit Court thoroughly analyzed the ADEA's text, it's legislative history, and underlying purposes in deciding that Congress had not demonstrated an intention to foreclose arbitration of an individual employee's written agreement to arbitrate employment claims with his employer (App. 7a-23a). Petitioner cannot fault the correctness of the Fourth Circuit's legal analysis; he simply dislikes the result. That dislike, however, provides no basis for granting the Petition.

Petitioner attempts to create an issue for review by mischaracterizing

the Fourth Circuit's decision and the status of this Court's earlier decisions. For example, contrary to the Petition's suggestion, neither the Fourth Circuit nor any other circuit court applying the Federal Arbitration Act has questioned the "continued viability" of Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) or any other decision of this Court. (Petition 7-8) Since Alexander does not control or even address the central issue in this case, any question of its "continued viability" has no significance for resolving this Petition. This argument is a false issue and should not mislead the Court.

The Fourth Circuit found Alexander "inapposite" in applying the Federal Arbitration Act to an individual employee's written agreement to

arbitrate employment disputes. (App. 24a) The circuit court similarly found that Barrentine v. Arkansas-Best Freight Systems, 450 U.S. 728 (1981) and McDonald v. City of West Branch, 466 U.S. 284 (1984) were inapposite to the facts and legal issue presented in this case. Certainly a lower court can properly determine that another court decision is inapposite to a particular set of facts or legal issue without questioning that decision's "viability".

The Fourth Circuit's determination that Alexander, Barrentine, and McDonald do not control the Federal Arbitration Act question here is clearly correct for several reasons. First, none of these cases required this Court to analyze an arbitration agreement in light of the dictates of the Federal Arbitration Act.

Since that Act was not analyzed or applied in any of these earlier cases, the central question required by the Act was never considered in the earlier decisions. (i.e., identifying a Congressional intent to foreclose enforcement of an arbitration agreement.) Where the earlier decisions did not consider that question, and, specifically, where this Court never considered the particular statute in this case -- the ADEA -- the earlier Supreme Court decisions clearly do not control the issue that was before the Fourth Circuit.

Also, the Petition similarly misstates that:

> the Fourth Circuit found that the [Supreme Court's] three [earlier] cases were displaced by Mitsubishi . . . McMahon . . and Rodriguez de Quijas. . .

(Petition 8) (emphasis added). As already noted, the Fourth Circuit only found that these decisions were "inapposite" (App. 24a) and for several reasons determined that the earlier cases "do not control our decision here." (App. 27a). As shown by the Circuit Court's point-by-point contrast of key factors and facts (App. 23a-27a), Alexander, Barrentine, or McDonald do not alter or conflict with this Court's required analysis prescribed by McMahon and other Supreme Court decisions under the Federal Arbitration Act.

The Fourth Circuit's proper application of the Arbitration Act to this case did not require "displacement" of Alexander or any other decision of this Court. The proper analysis set forth in Mitsubishi and McMahon led the

Circuit Court to the correct result without a conflict with Alexander, Barrentine or McDonald. This illusory argument in the Petition should not misdirect this Court's attention by suggesting that the Fourth Circuit has failed to follow any controlling authority.

Next, the Petitioner misrepresents the decision below by claiming that:

> [t]he Fourth Circuit's opinion fails to recognize that Mitsubishi, McMahon, and Rodriguez each involved disputes arising out of a business context.

(Petition 9). The Fourth Circuit directly addressed this point:

> We remain sensitive to the fact that the context in which this case arises differs somewhat from the contexts of Mitsubishi, McMahon and Rodriguez. Whereas the statutes in those cases were primarily commercial in focus, the ADEA is a civil rights statute. Moreover, the complainants in those cases were securities customers and

> persons injured by antitrust violations, not employees who are allegedly victims of discrimination in the workplace. Although the beneficiaries of statutory protections may vary, the principles of statutory interpretation do not.

(App. 29a-30a) The Petition's misstatement on this point again shows the inadequate justification for granting the Petition.

The Petition also overstates the conflict between circuit courts. (Petition 10) This error becomes more obvious when the Federal Arbitration Act's requirements under McMahon are acknowledged. McMahon requires that a court separately analyze the text, legislative history and purposes of each statute in dispute. For example, Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq., has never been in dispute in this litigation.

Therefore, circuit court decisions which involved Title VII claims[1] do not present a true conflict with the statutory analysis of the ADEA presented here. Indeed, because Mitsubishi and its progeny require analysis of the specific statute that allegedly conflicts with the Federal Arbitration Act, Petitioner's threshold reliance upon Alexander (Title VII), Barrentine (Fair Labor Standard Act) and McDonald (Civil Rights Act of 1871) must fail, particularly where this Court was not called upon to analyze those statutes under the Federal Arbitration Act as this Court subsequently required in McMahon.

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[1] Utley v. Goldman Sachs & Co., 883 F.2d 184 (1st Cir. 1989) and Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304 (8th Cir. 1988)

The Third Circuit's decision in Nicholson v. CPC Int'l, Inc., 877 F.2d 221 (3d Cir. 1989) reached a different result than did the Fourth Circuit in determining that the Federal Arbitration Act could not mandate arbitration of an ADEA claim. The Fourth Circuit specifically addressed the decision and made clear its rationale for reaching a different result:

> We find the reasoning of the majority opinion in Nicholson unpersuasive, and therefore we have respectfully chosen not to follow it. Instead, we are in agreement with Judge Becker's dissent in that case that Congress did not intend to preclude waiver of the judicial forum by ADEA claimants.
>
> Our holding reflects nothing more than the view that courts should not strain to find in statutes what Congress has not put there. We find no congressional intent to preclude waiver of the judicial forum in the text, the legislative history, or the underlying purposes of the ADEA. We recognize that the ADEA embodies without question an important

> federal policy in prohibiting age discrimination. So too, however, do the Securities Act of 1933 and the Securities Exchange Act of 1934 represent, inter alia, an important federal policy in protecting investors from fraudulent securities transactions. Likewise the Sherman Act reflects an important federal policy in preventing excessive concentration in relevant markets. Nonetheless, arbitration of claims under these statutes is clearly encouraged. See Mitsubishi, McMahon, and Rodriguez.
>
> Courts cannot determine whether arbitration agreements are to be enforced by making subjective judgments as to the relative importance of various federal statutes. Rather, Congress must provide clear guidance if it wishes federal courts to refrain from enforcing arbitration agreements when violations of a particular statutory right are alleged. Without such affirmative guidance in the ADEA, we are reluctant to set aside a coordinate federal statute such as the Arbitration Act.

(App. 27a-29a) Respondent submits that the Fourth Circuit's reasoning is profoundly correct in light of this

Court's decisions in Mitsubishi, McMahon, and Rodriguez. It is readily apparent that the Fourth Circuit's decision correctly determined that an individual arbitration agreement can be enforced to resolve an ADEA claim when that court's analysis is juxtaposed against this Court's clear holding in Mitsubishi:

> By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

473 U.S. at 628. The Nicholson decision patently ignores this point. Respondent therefore submits that the Nicholson court's erroneous analysis should not

provide a basis for review of the present case.

PETITIONER'S WRITTEN ARBITRATION AGREEMENT WAIVES NO SUBSTANTIVE RIGHTS

The Petition's challenge to the validity of the written arbitration agreement ignores the clear protection provided Petitioner by this Court's interpretation of the Federal Arbitration Act in Mitsubishi. 473 U.S. at 628 (quoted supra, at page 16). Where a party to a written agreement gives up no substantive rights, there is no question of waiver, prospective or otherwise. Further, the court below correctly resolved this question based on clear precedents of this Court. The Fourth Circuit explained:

> Gilmer also argues that the arbitration agreement should not be enforced because it constituted a prospective waiver. This plainly

is not is not the law. Prospective waiver of the judicial forum lies at the heart of the FAA, where it is not only permitted but encouraged. In addition, prospective waivers were clearly approved in Mitsubishi, McMahon, and Rodriguez. In all three cases, the Court enforced arbitration agreements which were entered into before the cause of action at issue arose. See Mitsubishi, 473 U.S. at 617-18; McMahon, 107 S. Ct. 15 2335-36; Rodriguez, 109 S. Ct. 15 1918-19. If, however, Gilmer means that prospective waivers must be examined to determine whether they were knowing and voluntary, then this certainly is true. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15 (1974). However, Gilmer has never asserted that his waiver was anything other than knowing and voluntary, nor is there anything to lead us to that conclusion.

Our holding is further buttressed by the fact that it is well-established that federal courts need not always be the forum for the resolution of ADEA claims. The grant of concurrent jurisdiction to state and federal courts in the ADEA allows ADEA claimants to bring their claims in state court in the first instance. See Mathis, 680 F. Supp. at 547; Jacoby v. High Point Label, Inc., 442 F. Supp. 518, 520 (M.D.N.C. 1977). Thus, Congress clearly did

not intend that all ADEA disputes be resolved in federal court; rather it contemplated a more flexible scheme for the resolution of individual ADEA claims. In fact, Congress' grant of concurrent jurisdiction over ADEA suits may evince an affirmative intent, apart from that contained in the FAA, to permit waiver of the judicial forum. In Rodriguez, the Court noted that congressional legislation provided for concurrent jurisdiction constituted an "explicit authorization for complainants to waive [federal court procedural] protections by filing suit in state court." 109 S. Ct. at 92 The Court went on to declare that "arbitration agreements, which are 'in effect, a specialized kind of form-selection clause,' should not be prohibited . . . since they like the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise." Id. at 1921 (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974)). The grant of concurrent jurisdiction in the ADEA evidences, if anything, a congressional intent to provide a broad right of forum selection, including the right to elect arbitration.

(App. 19a-21a) In light of this Court's clear holding in Mitsubishi as well as the Fourth Circuit's proper resolution of this question, there is no need for this Court to address this question again.

Finally, Petitioner challenges the lower court's reading of the record evidence. The lower court did determine that the employee "never asserted that his waiver was anything other than knowing and voluntary." (App. 20a) However, Petitioner's argument here as before the court below relies upon argument of his counsel, not the record evidence. Petitioner submitted no evidence before the district court and that court did not find that his agreement was involuntary. (App. 39a-42a) Petitioner never cross

appealed to the circuit court on this point. Indeed, Petitioner's counsel told the trial judge:

> "I'm not alleging any fraud or anything."

(See Joint Appendix before the circuit court 43-44.) The Fourth Circuit properly evaluated the record evidence on this point. It was not compelled to substitute argument of Petitioner's counsel for the evidence. Certiorari is not needed where the lower court properly evaluated the record evidence. Also, Petitioner urges this Court to find a lack of consideration for his signing the arbitration agreement. The Fourth Circuit necessarily resolved this argument when it found that:

> "As required for his employment, Gilmer registered as a securities representative with the New York Stock Exchange."

(App. 3a) (emphasis added). Although Petitioner's counsel attempted to convince the District Court on this consideration argument (Circuit Court Joint Appendix, pages 20, 41, 43-46), the trial court did not find any lack of consideration. (App. 39a-42a) Petitioner did not cross appeal on this or any point of law or fact. Petitioner's written agreement to arbitrate employment disputes is clearly valid and enforceable as authorized by the Federal Arbitration Act.

CONCLUSION

In light of the foregoing reasons and authorities, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James B. Spears, Jr., do hereby certify that I have this day served a copy of the within and foregoing Repondent's Brief in Opposition to Petition for Certiorari, upon the following person(s), by placing copies of same in the United States Mail, properly addressed and with the correct amount of postage affixed thereto, to the following persons:

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Dated this the 27th day of July, 1990.

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